IN THE

SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1976

* * *

NO. 76-1645

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GENERAL DYNAMICS CORPORATION,
Petitioner

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Respondents

* * *

On Petition For A Writ of Certiorari To The Supreme Court of Texas

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 475-3131

Attorneys For Petitioner

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OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 547 S.W.2d 255 and is reproduced as Exhibit C in the Petition, with a concurring opinion reproduced as Exhibit D and a dissenting opinion as Exhibit E in the Petition. A revised dissent is reported at 547 S.W.2d 259, along with the overruling of the motion for rehearing, and is reproduced as Exhibit F in the Petition.

The opinion of the Austin court of Civil Appeals is

reported at 533 S.W.2d 118 and is reproduced as Exhibit B in the Petition.

The judgment of the district court of Travis County, Texas, 98th Judicial District, is reproduced as Exhibit A in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, but Respondent denies that the state's collection of the tax in question is in violation of Article I, Section 8, Clause 17, of the Constitution of the United States.

ISSUES PRESENTED

1. IS THE STATE'S COLLECTION OF A FRANCHISE TAX ON THE BASIS OF A FORMULA THAT INCLUDES BUSINESS CONDUCTED IN A FEDERAL ENCLAVE WITHIN THE STATE VIOLATIVE OF ARTICLE I, SECTION 8, CLAUSE 17, OF THE CONSTITUTION OF THE UNITED STATES?

2. IS THE TEXAS FRANCHISE TAX A TAX "LEVIED ON, WITH RESPECT TO, OR MEASURED BY, NET INCOME, GROSS INCOME, OR GROSS RECEIPT" WITHIN THE BUCK ACT, 4 U.S.C. §§106(a) AND 110 (c)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition at pages 3-5 adequately sets forth the applicable provisions of Article I, Section 8, Clause 17, Constitution of the United States, the Buck Act, 4 U.S.C.

§§106(a), 110(c), and the Texas franchise tax, Texas Taxation-General, Articles 12.01, 12.02.

STATEMENT OF THE CASE

Generally, Petitioner's statement of the facts and nature of this case is adequate.[1]

REASONS FOR NOT GRANTING THE WRIT

This Court has firmly established that a nondiscriminatory tax on corporate franchises is valid, notwithstanding the inclusion of tax exempt property or income in the measure of it. *Werner Machine Co., Inc. v. Director of Division of Taxation, Department of Treasury, New Jersey*, 350 U.S. 492 (1956); *Educational Films Corp. v. Ward*, 282 U.S. 379, 392 (1931); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 162 (1910). The Texas franchise tax has been upheld by this Court, *Ford Motor Company v. Beauchamp*, 308 U.S. 331 (1939), and is not violative of Article I §8 of the United States Constitution in this case because Texas may reasonably measure its tax according to total statewide sales including sales within a federal enclave. Insofar as Petitioner's contentions turn on the interpretation of the Texas franchise act, the correctness of the decision of the highest court of the state does not warrant review by this Court. *Gurley v. Rhoden*, 421 U.S. 200 (1975); *McLeod v. Dilworth Co.*, 322 U.S. 327, 328-330 (1944).

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[1]Respondents, however, must take strong exception to Petitioner's effort to belatedly introduce evidence in this case through footnotes numbers two and three on pages six and seven of the Petition. Although Respondents do not feel the figures, if accurate, are material to the issues in this case, we cannot allow to go unchallenged the effort by Petitioner to introduce evidence on appeal. If the figures are material, evidence supporting them should have been introduced at the appropriate stage of these proceedings when contrary evidence, if any, could also have been introduced and a finding of fact entered.

Computation of the Texas franchise tax on the basis of income realized by Petitioner, the General Dynamics Corporation, from its sales on a federal enclave in Texas also is permissible under the Buck Act, 4 U.S.C. §104, *et seq.* General Dynamics Corporation does not contend that the tax falls on an instrumentality of the United States; nor does it contend that assets or property of the corporation located on a federal enclave cannot be considered in computing the Texas franchise tax. Petitioner's sole complaint is that its income from sales on a federal enclave in Texas cannot be used in computing the Texas tax. This contention is in conflict with the intent of Congress that the Buck Act be remedial legislation and broadly construed, as is made clear in the Report of the Senate Committee on Finance:

> "Subsection (c) defines the term 'income tax' to mean any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. This definition, as well as the preceding definition of sales or use tax, must of necessity cover a broad field because of the great variations to be found between the different State laws. *The intent of your committee in laying down such a broad definition was to include any State tax (whether known as a corporate-franchise tax, or business-privilege tax, or by an other name) if it is levied on, with respect to, or measured by net income, gross income, or gross receipts.*"
>
> S. Rep. No. 1625, 76th Cong., 3rd Sess., at 5 (1940) (Emphasis added)

This Court in *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953), has emphasized that:

> "The grant . . . given within the definition of the Buck Act . . . was for *any tax* measured by, net income, gross income, or gross receipts."
>
> 344 U.S. at 629 (emphasis supplied by this Court)

The Texas franchise tax is a tax levied for the privilege of carrying on business in Texas and is measured by income or gross receipts. In *Southern Realty Corporation v. McCallum*, 65 F.2d 934, 935-36, *cert. denied* 290 U.S. 692 (1933) the court indicated:

> "The [corporate franchise] tax is not laid on property or on income, though both are regarded in measuring it."

This description is consistent with the description of the same tax provided by this Court in *Ford Motor Co. v. Beauchamp, supra* at 332.[2] Furthermore, treatment of an economic benefit, such as a franchise, as income is supported by decisions of this Court. *See Philadelphia Park Amusement Co. v. United States*, 126 F.Supp. 184 (Ct. Cl. 1954); *Baxter v. C.I.R.*, 443 F.2d 757 (9th Cir. 1970); *United States v. Hardy*, 74 F.2d 841 (4th Cir. 1935); *Elston Co. v. United States*, 21 F.Supp. 267 (Ct. Cl. 1937).

Petitioner's reliance on cases such as *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964) and *Board of Equalization of the City and Independent School District of Forth Worth v. General Dynamics Corporation*, 344

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[2]Petitioner incorrectly states that this Court in *Ford Motor Co. v. Beauchamp*, held that the Texas franchise tax is a tax on capital. In the aforementioned case, this Court correctly described the Texas franchise tax realizing the importance of both capital and gross receipts in finally measuring the tax. *Id.* at 332. However, only the use of capital located outside of Texas was at issue in the case.

S.W.2d 489 (Tex.Civ.App.-Fort Worth, 1961, writ ref'd n.r.e.) is misplaced because both cases involve the levy of property taxes, not the Texas franchise tax. The court in *Mississippi River Fuel Corporation v. Cocreham*, 382 F.2d 929 (5th Cir. 1967) *cert denied*, *Mouton v. Mississippi River Fuel Corporation*, 390 U.S. 1014 (1968), was considering a tax different from the Texas franchise tax, reached the issue of the Buck Act only in passing, and has had its opinion distinguished in *Humble Oil & Refining Company v. Calvert*, 478 S.W.2d 926, 932 (Tex.) *cert. denied*, 402 U.S. 967 (1972).

CONCLUSION

The decision of the Texas Supreme Court in this case should be sustained because it is a correct determination of applicable law and consistent with the holdings of this Court. Texas may reasonably measure its franchise tax according to gross receipts from total statewide sales, including gross receipts from sales within a federal enclave.

PRAYER

Respondent, therefore, prays that the petition of General Dynamics Corporation for writ of certiorari be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 475-3131

Attorneys For Petitioner

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of the State of Texas, do hereby certify that a true and correct copy of the above and foregoing Brief for Respondent in Opposition has been placed in the United States Mail, postage prepaid, certified, return receipt requested, to Ms. Mary Joe Carroll, Attorney at Law, P.O. Box 1148, Austin, Texas 78767, on this the 7th day of July, 1977.

LONNY F. ZWIENER